No. 66

In the Supreme Court of the United States

OCTOBER TERM, 1952

MARCEL MAX LUTWAK, MUNIO KNOLL, AND REGINA TREITLER, *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

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OPINIONS BELOW

The original opinion of the Court of Appeals (R. 391-400) and its supplemental opinion on rehearing (R. 404-414) are reported at 195 F. 2d 748.

JURISDICTION

The judgments of the Court of Appeals were entered January 3, 1952 (R. 401-403). A petition for rehearing was denied on April 16, 1952 (R. 415). The petition for a writ of certiorari was filed May 16, 1952. The jurisdiction of this Court

is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether, in a trial for conspiracy to bring aliens into the United States as spouses of United States veterans upon the basis of ostensible marriages and to continue to conceal the true nature of the relationships from the Immigration and Naturalization Service, evidence relating to certain acts after the entries into the United States was improperly admitted as relating to matters subsequent to the termination of the conspiracy or not in furtherance thereof.

2. Whether after considerable testimony had been introduced as to the sham character of the marriage the testimony of the ostensible wife was properly admitted over objection of the ostensible husband.

3. Whether ostensible marriages in France were to be presumed valid under the law of France in the absence of a showing by defendants to that effect.

STATEMENT

The petition for a writ of certiorari seeks review of judgments of the Court of Appeals for the Seventh Circuit (R. 401-403) unanimously affirming the judgment of the District Court for the Northern District of Illinois imposing sentences of two years imprisonment and fines of $10,000 on each of petitioners (R. 366-367) upon the verdicts of the jury (R. 358-360) finding petitioners guilty

as charged in the first count of a six-count indictment.[1] That count charged petitioners and two others, Leopold Knoll and Grace Klemtner,[2] with conspiracy to commit substantive offenses set forth in the remaining counts, and conspiracy to defraud the United States of and concerning its governmental functions and rights with respect to the immigration laws and the Immigration and Naturalization Service (R. 4-9).

It was alleged that a conspiracy was begun on or about July 1, 1947, under which Marcel Lutwak, Bess Osborne, and Grace Klemtner, all unmarried citizens of the United States and honorably discharged veterans of the second world war, would journey to Paris and go through the form of a marriage ceremony with three aliens residing in Paris, Maria, Munio and Leopold Knoll, respectively; that the three aliens would then enter the United States as non-quota immigrants and would not live with their ostensible spouses as man and wife but would sever the ostensible ties as they saw fit. It was further charged that, as a part of the conspiracy, petitioners and Leopold Knoll and Grace Klemtner "would at all times subsequent to the formation of the said conspiracy conceal such transactions and acts aforesaid and would do such other, further and different acts as they might deem necessary and expedient to prevent the disclosure to the United States Immigration and Naturalization Service of the existence of said con-

[1] The remaining counts were dismissed for want of venue (R. 291, 302, 333).

[2] Leopold Knöll was acquitted (R. 361) and the indictment was dismissed as to Grace Klemtner (R. 224-225, 333).

spiracy" (R. 5-7). The specified 21 overt acts included, *inter alia:* conversations of Treitler in the late summer of 1947 with respect to obtaining spouses for the Knolls; trips to Paris and going through the form of marriage ceremonies there by Marcel Lutwak on August 21, 1947, by Bess Osborne (accompanied by Treitler) on November 4 [sic]), 1947, and by Grace Klemtner on November 6, 1947; entry of the three ostensible spouses into the United States on September 9, November 13, and December 5, 1947; the residing together, commencing in November 1947, of Munio Knoll and Maria, the ostensible wife of Marcel Lutwak; the residing apart, commencing December 1947, of Leopold Knoll and his ostensible spouse; the conversation of Marcel Lutwak, Munio Knoll, and Bess in November 1947, in which the latter was paid $1,000 for her participation in the ceremony; and the divorce, on March 31, 1950, of Marcel Lutwak and his ostensible spouse (R. 7-9, 30-32, 206).

At the trial, the Government's first witness, Anne Zapler, testified that in the late summer of 1947 petitioner Regina Treitler twice asked her whether she "knew of any girls who could go to Europe and marry her brother and bring him here to the States," the girl to have her way paid and to receive a fee and "at the end of the period of six months, they could be divorced and they would not have to consummate the marriage" (R. 29-31, 37-38). Later, Zapler had a conversation with petitioner Lutwak, a nephew of Treitler, regarding the same matter but she did not recall what it might have been (R. 31). In September 1947, Zapler introduced Bess Osborne to Lutwak,

mentioning that Osborne was an ex-Wave (R. 31-33). Later in September, Treitler expressed her happiness over the fact that Bess "had consented to go," upon the apparent assumption that the ex-Wave was to marry Leopold Knoll (R. 35).[3]

The Government's second witness, Maria Knoll, who had entered the United States as Lutwak's ostensible wife, had obtained a divorce from Lutwak before trial (R. 69-70, 91-92). She had been married in 1932 to petitioner Munio Knoll, Lutwak's uncle (R. 60, 71-72), but Knoll's counsel interposed no objection to her testimony, contending that Maria had been validly divorced from Knoll in 1942 (R. 52). She testified on direct examination as follows:[4]

She first met Lutwak in Paris at the end of July or beginning of August 1947, being introduced to him by an uncle, as well as by Munio and Leopold Knoll, and by a cousin Charlotte (R. 60-61). She was married to Lutwak in Paris on August 31, 1947, in a civil ceremony, in the presence of Munio Knoll and the cousin Charlotte (R. 60). No wedding ring was ever received from Lutwak (R. 62). On September 9, 1947, the witness entered the port of New York as a bride of a United States serviceman; she signed the application for admission (Govt. Ex. 1), but the data therein were written out by Lutwak, including the representation that her destination was Lutwak's home on Madison Street, Chicago (R. 62-63).

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[3] The Zapler testimony was at first admitted only against Treitler and Lutwak, respectively (R. 30, 32, 35), but, upon the further testimony indicative of a conspiracy by three more witnesses, was admitted against all the defendants (R. 141).

[4] Her testimony was admitted as against all the defendants (R. 287).

On September 10, she arrived in Chicago and resided with either Regina Treitler or a relative for about three months. Thereafter, she resided in Munio Knoll's apartment on Maypole Street until November 1948, except for a few months spent in New York, and thereafter in New York until the date of the trial. At no time during this period did Lutwak live in the same house or apartment with Maria. Munio Knoll lived at the Treitler home commencing with the middle of November 1947, during Maria's stay there. (R. 65-69.)[5]

Ludmer and Haberman, two business associates of Munio Knoll subsequent to his entry into the United States, each testified that Treitler told them that she had "helped [Munio and Leopold Knoll] come to this country by getting girls and paying them off" and that she "paid off a thousand dollars each" (R. 93, 96-97, 180).[6]

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[5] On cross-examination, Maria stated that she was acquainted with Lutwak for about four weeks before the marriage ceremony, that there had been a courtship, that she fell in love, that there was no talk in Paris of getting a divorce, that she lived with Lutwak as husband and wife at all of the Chicago addresses, that the marriage was "consummated," and that she had never lived with Munio Knoll as husband and wife after her marriage to Lutwak (R. 76-78, 82, 84-85, 90).

[6] Petitioners sought to show bias on the part of Ludmer and Haberman on the basis of their business disagreements with Munio Knoll (R. 108-109, 112, 120-123, 128). The Treitler statements in the presence of Ludmer were made in a conversation which included Lutwak and Munio Knoll, and were admitted only against Treitler, Lutwak, and Munio Knoll

In conversations with Haberman in New York in late November and early December 1947, Munio Knoll stated, in the presence of Lutwak, that he and Lutwak were awaiting the arrival of Leopold Knoll. He explained the speed of his own entry into the United States and that of Leopold as follows, "when you have the right connections and are willing to spend money you can pave your way very quickly." "You see how easy it is to come to the United States if you know how." (R. 151, 153, 155). Knoll also referred to Maria as his wife, and Lutwak stated himself to be unmarried (R. 153).[7]

During January 1948 and the early part of February, Ludmer considered the Maypole Street apartment as the residence of Maria and Munio Knoll (R. 94-95) and knew Maria's last name as "Mrs. Knoll" (R. 103, 118). He picked up Knoll on the way to business almost daily and saw only Maria and Knoll at the apartment in the mornings (R. 104-105). On one Sunday in early February 1948, after an evening at the Treitlers', he took Maria to the Maypole Street address and Lutwak to "his home" at another address (R. 104).[8]

(R. 94, 129); the Treitler statement made to Haberman was admitted only against her (R. 180).

[7] These conversations were admitted only as against Munio Knoll and Lutwak (R. 152).

[8] There was testimony, admitted only against Munio Knoll, that in February 1948 Knoll rushed to Chicago after receiving a telephone call in New York (R. 162-165), that he subsequently reported that he had difficulty in getting into his Chicago apartment and that, when he got in, Lutwak jumped through the window (R. 98-99, 101-103). Thereafter, Maria

In June 1948, Haberman saw Maria with Knoll at the Maypole Street apartment, including an early morning sight of them in bed together (R. 176-179). Maria was always known as Munio Knoll's wife to Haberman, and never as Mrs. Lutwak (R. 181).

Jane Turner testified that she saw Grace Klemtner off to Europe at the Chicago airport in December 1947 and met her upon her return at the New York airport as the ostensible Mrs. Leopold Knoll (R. 132-134). Present upon Klemtner's return were Leopold and Munio Knoll, and Marcel Lutwak (R. 134). Klemtner told Turner that Leopold was ill (R. 137). The two women went from the airport to a New York hotel, where they stayed for three days. Thereafter, they went to Los Angeles, where they resided together in various apartments until the time of the trial. At no time did Leopold Knoll reside with Klemtner and Turner. In Los Angeles, Grace used the last name "Klemtner," but received mail under the name "Knoll" as well as "Klemtner." She received letters and money from Leopold Knoll from time to time (R. 134-138).

Subsequent to the foregoing testimony, the United States Attorney read into the record the sworn testimony of Munio Knoll before immigration officers given on November 24, 1948, and Janu-

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went to New York (R. 102). In April and again in May 1948, Haberman saw Maria and Munio Knoll at a New York hotel and when he urged Knoll to become reconciled with Maria, Knoll replied that it was not simple after having come back suddenly from New York and "found her with another man" (R. 165, 169). In the second conversation Knoll thought he might get together again with Maria (R. 169).

ary 4, 1949. The statements were received in evidence only against Munio Knoll (R. 185, 282; Gov. Exs. 13 and 14), and disclosed the following:

Knoll had first testified in the immigration service investigation to the effect that he had obtained a court divorce from Maria in Budapest in 1942 on the ground that he and Maria were second cousins (Gov. Ex. 13, p. 5). He later testified that the divorce was a "Jewish divorce," not a court divorce (p. 11), although he was a professing Catholic at the time (Gov. Ex. 14, p. 4). Still later, he testified that the reasons given had been sexual incompatibility, the separation of Maria from him, the absence of any children, and the concealment of identity from the Nazis (Gov. Ex. 14, p. 3). He could not produce the divorce decree (Gov. Ex. 13, p. 11) but testified that he had exhibited it to the Paris officials at the time of his ostensible marriage to Besse Osborne in 1947 (p. 7).[9] After the rabbinical divorce he and Maria went to different towns in Hungary (Gov. Ex. 13, p. 13). They were apparently together in Roumania, Maria allegedly being employed by him there (Gov. Ex. 14, p. 6). She preceded him to Paris in 1947 by three months and lived "on her own money" there, including money which Knoll paid her by reason of his employment of her in Roumania (pp. 5, 6). Knoll reached Paris in June 1947. He denied that he

[9] He explained the fact that his prior divorce did not appear in the 1947 marriage certificate although that of Osborne was stated (see Dfts. Ex. A), because he had not felt it necessary to direct attention of the Paris authorities to the divorce, since he assumed they would note it from the decree he had left in the papers deposited by him (Gov. Ex. 13, p. 13).

held out Maria as his wife or lived with her. He denied that he knew of any ulterior purpose in her marriage to Lutwak, although he had stated to her "that she should marry [Lutwak] as it was the only way she could gain entry into the United States" (pp. 5-6). He denied any payments or promises to Lutwak (pp. 7, 25-26). He further denied that there was any discussion looking toward his following Maria to the United States. He testified that although the Unitd States relatives wanted him to "reunite" with Maria, he wrote to them that he neither wanted to go to the United States nor rejoin Maria (p. 6).

With respect to the period of approximately a week from the time of Bess Osborne's arrival in Paris to the date of the ostensible marriage with her,[10] Knoll testified, "I was living in a hotel where all the Americans congregated and she was living in that hotel and I got to know her. I showed her Paris. * * * [N]obody introduced me" (Gov. Ex. 13, p. 7). He testified, "On my part the marriage was bona fide because one takes every step possible to come to America and whether it was bona fide on her part, I can't answer that directly" (Gov. Ex. 14, pp. 11-12). He asserted that the marriage was "consummated" in Paris but that he had never had sexual intercourse with Osborne, and had spent only part of one night in Paris with her (p. 13). The two separated upon arrival in the United States (p. 24).

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[10] Osborne left Chicago for Paris by plane on October 25, 1947 (Gov. Ex. 8). The ostensible marriage ceremony took place on November 3, 1947 (Dft. Ex. A).

Knoll further testified that about three days after his arrival in Chicago, Lutwak asked Knoll to meet him and Osborne at the Admiral restaurant, since Osborne needed money. Knoll went to the restaurant, desiring to be present at any payment of money, because he had heard that a portion of an aggregate sum of $10,000 Knoll had sent to a sister in New York, had been diverted to Lutwak. He saw Lutwak deliver a check to Osborne but knew nothing of its amount or the source of the money (Gov. Ex. 14, pp. 7-8, 10, 14-15).

He testified that he had moved to the Maypole Street apartment in Chicago on December 24, 1947, and that Maria left when he moved in, but returned for a few days and did not live there "the whole time." He asserted that the living together with Maria was never as man and wife. (Gov. Ex. 13, pp. 11-12, Gov. Ex. 14, pp. 25-26.)

After the reading into evidence of Munio Knoll's statements, Bess Osborne, over objection of defense attorneys, was permitted to testify, the trial judge ruling that in the case of "people going through something that is a mockery, which they did not intend to be a marriage" preliminary *voir dire* examination of the ostensible wife would be unnecessary and that no foreign law would be presumed to grant the status of spouse upon the basis of the facts in evidence (R. 187, 189). Osborne testified, *inter alia,* as follows:

She was introduced to Lutwak early in September 1947 by Zapler. Lutwak told her he had an uncle Leopold Knoll in Europe whom he wanted to bring to the United States, that he wanted a woman who had been in the service to marry the uncle for the purpose and would pay $1,000, and that after

six months the ostensible spouse could have a divorce. About a week later, Osborne met Treitler at her home with Lutwak and Maria present. Treitler urged the sympathetic aspects of the project upon Osborne (R. 192-195, 202).

About the end of September, Lutwak and Osborne had further talks arranging the details of her trip, and the payment of $500 for expenses and $100 for clothes. Lutwak asked Osborne to marry Munio instead of Leopold Knoll, so that Munio could be reunited with his former wife. Lutwak accompanied Osborne when she applied for her passport (R. 195-198, 219-220). Osborne met Treitler again at the Chicago airport on October 25, 1947, when the two left for Paris. Osborne did not pay for her own ticket. Lutwak and Maria were also present. At Paris, the next day, Osborne and Treitler were met by Munio Knoll and a relative of the Knoll's, Wircberg. Treitler introduced Osborne to Knoll. They stayed at le Khedive hotel, where Knoll also stayed. During the week following their introduction, Osborne and Knoll went to a lawyer's office where all arrangements for the ostensible marriage were made. The marriage ceremony occurred on November 3, 1947, at the Paris City Hall, in the presence of Leopold Knoll and Wircberg. No wedding ring was given Osborne either then or thereafter (R. 191-192, 197-199).

After the ceremony, Osborne lived by herself at le Khedive and later at another hotel. During this time Treitler told her, several times, that she would receive $1,000 (R. 200-201). On November 12, 1947, Munio Knoll and Osborne left Paris, arriving in New York on November 13, where Knoll applied for admission as a nonquota immigrant

(R. 202-204). They arrived in Chicago that night. Lutwak and Maria were among the group at the airport. Lutwak and Osborne went by cab to a hotel, Lutwak again informing Osborne that she would get $1,000. Knoll went elsewhere with the others. About three days later, Osborne, Lutwak, and Munio Knoll met at the Admiral restaurant, where Lutwak gave Osborne a $1,000 check signed by Lutwak (R. 204-207).

About six months later, Osborne discussed a divorce with Knoll, and Knoll asked her to wait two years "because he wanted to become an American citizen." On May 3, 1950, Osborne filed her petition for divorce.[11] In November 1950, Knoll asked her to wait until after the conspiracy trial[12] (R. 208-209).

At no time did Munio Knoll ask that the ostensible marriage be "meant" or be followed by living together (R. 215). At no time subsequent to the ceremony did Osborne use the ostensible married name and, according to the understanding, she was not to use the name. The marriage was never "consummated." Munio Knoll never contributed to Osborne's support and Osborne never lived with him (R. 209-210, 213, 220).

Grace Klemtner was then called as a witness of the court, upon the Government's expression of unwillingness to vouch for her, and over objection

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[11] The petition included an allegation that Osborne had "lived and cohabited" with Knoll until his desertion of her on November 15, 1947; Osborne testified that she had not read the text of her petition and would not have signed had she noted the statement (R. 214, 221-222).

[12] This conversation was admitted only against Munio Knoll (R. 209).

that she was the wife of Leopold Knoll (R. 224-226). She testified to substantially the same chronology of events already in evidence, i.e., her departure for Paris on November 1, 1947 (R. 228); the marriage ceremony on November 6 (R. 245), Knoll's entry into the United States with her on December 5 (R. 251), the residing with Turner at all times thereafter in New York, Chicago, and Los Angeles up to the time of the trial (R. 254-256). Klemptner further testified that she had known Treitler for many years and saw her three or four times a year at meetings of a women's organization to which both belonged. She had seen Treitler a few weeks before November 1, 1947, and Treitler arranged a hotel reservation in Paris for her, but made no suggestions concerning Klemtner and the brothers in Paris and never paid her any money (R. 228-230, 232). Klemtner first met Lutwak in 1946.[13] She testified that he had nothing to do with her trip, never paid her any money, never informed her of his own trip and marriage. He was present when Klemtner applied for a passport, and he took her and Turner to the airport (R. 232-234, 237-238, 247). In a later portion of her testimony, she refused to answer the question whether she had talked to Treitler or Lutwak about Leopold Knoll before leaving Chicago, asserting the privilege against self-incrimination (R. 247). She also refused to testify on the grounds of self-incrimination as to the source of the money for her round-trip plane fare (R. 242).

[13] Klemtner offered no explanation of the statement in Lutwak's affidavit on Klemtner's passport application that he knew her for four years (R. 238-239).

In conclusion, sworn statements to the immigration authorities by petitioners Treitler and Lutwak and by Leopold Knoll were read into evidence and admitted, in each case, only against the defendant who made them (R. 273-275, 282, Gov. Exs. 15-18).

Lutwak refused to testify before the immigration authorities concerning Maria (Gov. Ex. 15, p. 4). He did testify that he met Osborne at Treitler's home, that the whole family asked him to speak to Osborne about marrying his uncle and that there was a general "understanding" that Osborne would marry Munio "if they liked each other" (pp. 5-6, 10-13).

With respect to the payment to Osborne of $1,000 in November 1947 at the Admiral restaurant, Lutwak "vaguely" recalled that Munio Knoll had called for the meeting and directed this application of money held for him by Lutwak. He did not recall whether the money was payment for the ostensible marriage. Lutwak stated that he himself had never paid or been paid or promised anything in connection with the ostensible marriages (pp. 15-17).

Treitler testified before the immigration authorities that she knew Munio was unhappy because of his divorced status and she spoke with Osborne about him in the hope of making him happy (Gov. Ex. 16, p. 4; Gov. Ex. 17, p. 3). She stated that she could not recall whether Osborne was her invitee or guest on the Paris trip, and did not remember an agreement to pay $1,000 to Osborne (Gov. Ex. 16, p. 4; see also Gov. Ex. 17, pp. 3-4). Asked whether she knew, before going to Paris, whether "such marriages would facilitate

the entries," she testified that she "thought perhaps when they're married that will help them out to come later on to the United States" (Gov. Ex. 16, p. 6). In reply to questions whether there had been an earlier suggestion that Osborne would marry Leopold rather than Munio Knoll, whether other sisters assisted financially in bringing the relatives to the United States, and whether she ever talked with Grace Klemtner about a trip to Paris to meet the brothers, her response was that she could not remember (pp. 4-6).

The judge's instructions to the jury included the following language:

> During the trial, evidence has been admitted only as to certain defendants. You may consider that evidence, so limited, only as to those defendants, and not as to other defendants.
>
> * * * The declarations, statements and conversations of one or more defendants, made out of the presence of the other defendants, is not binding upon any other defendant, unless the evidence—not including any of such declarations, statements or conversations other than his own—shows, beyond a reasonable doubt, that such other defendant was a participant in the conspiracy charged in the First Count of the indictment at the time of such declarations, statements or conversations, and unless, further, the declarations, statements and conversations were in furtherance of the conspiracy and made during its continuance. * * * [R. 337-338].

* * *

* * * In considering whether or not a particular defendant was a member of the conspiracy, you must do so without regard to and independently of the statements and declarations of others. In other words, you must determine the membership of the particular defendant from the evidence concerning his own actions, his own conduct, his own declarations, or his own statements, and his own connection with the actions and conduct of others. [R. 341].

* * *

The mere knowledge, acquiescence, or approval of an act, without cooperation or agreement to cooperate, is not enough to constitute one a party to a conspiracy. * * * [R. 342].

* * *

* * * It is a question of fact based upon the evidence in this case for the jury to determine whether or not at the time the aliens entered into the United States under the provisions of the United States Code they were in fact entering as man and wife and to thereafter reside in the United States as man and wife. [R. 338].

* * *

Mutual consent is necessary to every contract and no matter what forms of ceremonies the parties may go through indicating the contrary, they do not contract if they do not in fact assent, which may always be proved. Marriage is no exception to this rule: a marriage in jest is not a marriage at all. It is quite true that a marriage without a subse-

quent consummation will be valid; but if the subjects agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has served its purpose to deceive, they have never really agreed to be married at all. They must assent to enter into the relation as it is ordinarily understood, and it is not ordinarily understood as merely a pretense or cover to deceive others.

You are hereby instructed that it is for you, the jury, to determine from all of the facts in evidence what the intentions of the parties were at the time the marriage ceremonies were performed. [R. 339.]

* * *

* * * It is sufficient if the parties intend immediately to be bound permanently, even though they do not intend forthwith to assume all the duties and responsibilities of marriage. Moreover, once there is this meeting of the minds and the marriage ceremony required by law is performed, the marriage is complete and the status of the parties as married becomes fixed by law, even though they immediately repudiate the agreement and thereafter act in total disregard of their marital rights and duties.

Although the cohabitation of the parties, subsequent to the marriage, is evidence of the existence and reality of their consent, cohabitation is not necessary to the validity of the marriage. Nor is a marriage invalid merely because it has not been consummated.

If the consent of the parties is plainly expressed, a secret reservation of one of the parties will not invalidate the marriage, nor will the fact that one of the parties gave his consent to the marriage because of some ulterior motive or motives invalidate it. If the essentials of capacity and consent are present, the marriage is valid, even though one of the parties consented because he expected some material advantage as the direct consequence of his entering into the marriage. The mere fact that one of the parties to a marriage knew and expected that by reason of entering into the marriage his coming to the United States would be facilitated does not in and of itself render the marriage invalid. [R. 340.]

ARGUMENT

I. Petitioners contend that there is a conflict between rulings on admission of evidence herein and the decision in *Krulewitch* v. *United States*, 336 U. S. 440. They base the contention on a broad assertion that "[t]he alleged objective of the conspiracy charged was to secure the illegal entry" and that "[u]pon the attainment of that objective the conspiracy terminated" (Pet. 9). The assertion both misstates what was "charged" and ignores what was proved in direct evidence as to the scope of the conspiracy.

The indictment charged not only conspiracy to obtain the fraudulent entry of the aliens into the United States but also conspiracy to live apart in the United States and sever the ostensible marital ties as they saw fit, and, further, to "conceal" the various acts and to do any further acts that the con-

spirators might deem "necessary and expedient" to prevent disclosure to the Immigration and Naturalization Service (*supra*, pp. 3-4). The indictment charged numerous acts after the entries as being overt acts under the conspiracy, including the residing apart of the ostensible spouses, the residing together of Maria and Munio Knoll, each of whom was the ostensible spouse of someone else, the payment of $1,000 to one of the ostensible spouses, and the divorce proceedings to terminate the ostensible ties of one of the "marriages" (*supra*, p. 4). These steps of the conspiracy, to be performed after the entries into the United States, were obviously necessary parts of the whole scheme.

Moreover, these later steps were evidenced against each conspirator by ample direct testimony, requiring no reliance on hearsay evidence of what some other participant in the conspiracy might have said. Thus, Treitler was shown by her own direct statements to Zapler to have contemplated various aspects of the conspiracy which would necessarily be subsequent to the entry of the ostensible spouses into the United States; at the time she was seeking girls to marry her brothers, Treitler said that the girls could be divorced after six months and that the marriage would not have to be consummated (*supra*, p. 4). Similarly, both Lutwak's own hand-written statement, prepared for Maria's signature on her application for admission, and Munio Knoll's own application for admission, falsified the destination of the ostensible alien spouses, thereby affording clear and direct evidence in public records that continuing concealment after entry into the United States was

a part of the conspiracy (Gov. Exs. 1 and 2; and see *supra*, p. 5). Furthermore, the subsequent conduct and admissions of Lutwak and Munio Knoll which were conclusively evidentiary of an earlier plan to live apart from the ostensible spouses in the United States, to make cash payment in the United States, to conceal, and in good time to be legally divorced from their ostensible spouses, were evidenced by testimony of witnesses who told of what they themselves heard and saw the two confess and do; these witnesses were not reciting hearsay of what someone else had told them that Lutwak and Knoll admitted or did. Lutwak and Knoll themselves testified to the payment to Knoll's ostensible spouse after arrival in Chicago, differing only in their story as to where the money came from. The $1,000 payment was not first thought up within the few days after arrival in the United States.

Furthermore, the separation of both sets of spouses immediately after arrival in the United States, and the immediate living together of Munio Knoll and Maria were scarcely consistent with anything but a plan that had patently envisaged what was to take place beyond the moment of entry into the United States. Lastly, the divorce proceedings with respect to both the Lutwak and Munio Knoll marriages constituted evidence, in public records and not hearsay, of conduct consistent with a plan which from its inception, envisaged divorce after entry.

In light of the clear charge in the indictment that the conspiracy included steps subsequent to the entry of the aliens into the United States, and in light of clear, direct evidence substantiating that charge, together with the trial judge's explicit in-

structions to the jury (see *supra*, pp. 16-17), there is no occasion for application of the rule in *Krulewitch* v. *United States*, *supra*, which dealt with a case in which hearsay evidence of the statement of one conspirator was sought to be used against another from a period of time subsequent to anything charged or proved as the duration of the conspiracy. In *Krulewitch*, this Court merely refused to infer a continuing "implied but uncharged" conspiracy to conceal (p. 444), after the charged conspiracy, relating to a single trip to Florida for purposes of prostitution, had been consummated. Here the charge and evidence obviate any need for inference in order to establish the duration of the conspiracy. The conspiracy was still operative at the time of all acts or statements of conspirators admitted in evidence against other participants.[14]

2. Although the court below entered into extensive consideration of whether a wife's testimony, in light of reason and experience, should still be inadmissible against her husband, and concluded that the husband's privilege in this respect should

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[14] It is to be noted that wherever there could be the slightest doubt whether a conversation was in furtherance of the conspiracy, the evidence of the conversation was carefully limited by the trial judge to the participants and was not admitted against others of the conspirators; e.g., the limitation of Munio Knoll's statements in the presence of Ludmer and Haberman (*supra*, pp. 7-8, fns. 7-8). Such limitation constituted a further elimination of any occasion for application of the *Krulewitch* rule. While petitioners contend in general terms that "[T]he decision below now extends [the hearsay] exception [to] admit into evidence statements and acts of a conspirator not in furtherance of the conspiracy and after it has terminated" (Pet. 11), they fail to specify a single instance in which conversations not in furtherance of the conspiracy were admitted against other conspirators.

no longer be recognized (R. 405-413), the question is not here posed for decision, since the trial judge, upon the state of the record, had no wife before him nor even prima facie evidence of a marriage.

The question is involved only with respect to the testimony of Bess Osborne. Maria, at the time of the trial, had been divorced by Lutwak. The United States Attorney asked her no question whatsoever involving confidential marital communications during the time between the ostensible ceremony with Lutwak in Paris and the divorce in the United States, or during the time of her admitted marriage, between 1932 and 1942, with Munio Knoll. (R. 40-41, 58-70, 90-91.) In the case of Grace Klemtner the privilege, if any, of objecting to her testimony would have been available only to Leopold Knoll, with whom she entered into an ostensible ceremony. In view of Leopold Knoll's acquittal the question with respect to her is moot.

Returning to Bess Osborne, it is to be noted that the court below stated, in the alternative, that if it was wrong in its general conclusion that the earlier common-law privilege of a husband no longer existed, the condition of the record was such that the trial judge was nevertheless justified in admitting the testimony (R. 413). We submit that the judgment below was correct upon this alternate basis and sustainable on the ordinary principles of evidence without need for considering any new or conflicting rulings of law. When Osborne was offered as witness, Zapler had already testified to successful efforts of Treitler and Lutwak to find a girl who would go to Paris, go through a ceremony with Munio Knoll without consummating the mar-

riage, be paid a fee, and thereafter obtain a divorce (*supra,* pp. 4-5). The second witness, Maria, had testified to an earlier marriage with Munio Knoll, and both her own testimony and that of Munio Knoll adduced a rabbinical divorce in 1942 or 1943 of such questionable validity, and a record of such extensive living together with Knoll subsequent to his ceremony with Osborne, as raised serious question whether Knoll had ever obtained a valid divorce from Maria and was even free to enter into a second marriage (*supra,* pp. 6, 11).[15] Any alleviation of this doubt by Maria's and Knoll's self-serving assurances that their living together had been platonic, and that Maria had sometimes and somewhere lived as man and wife with Lutwak (*supra,* pp. 6, fn. 5; 9-11), was clearly outweighed by the evidence of others concerning Knoll's holding out of Maria as his wife (*supra,* pp. 7-8; and see R. 143). Moreover, there had already been introduced Knoll's earlier testimony before the immigration authorities in which he admitted that he had never had sexual intercourse with Osborne, had spent only part of one night in Paris with her, and had separated from her upon arrival in the United States (*supra,* p. 10).

Upon this posture of the evidence, the trial judge was clearly justified as a matter of law in concluding that it was a matter of "people going through something that is a mockery, which they did not intend to be a marriage" (*supra,* p. 11). The certificate that a ceremony had been gone through merely

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[15] If, as a matter of fact, Knoll was still Maria's husband at the time of the trial, he expressly waived his privilege to object to her testimony against him (*supra,* p. 5).

showed the admitted fact that the motions had been made. A sham ceremony does not establish a marriage. *United States* v. *Rubenstein*, 151 F. 2d 915 (C. A. 2), certiorari denied, 326 U. S. 766. It likewise serves as no basis for assertion of the privilege accorded by public policy for the preservation of a genuine marriage.[16]

3. Petitioners, and in some degree the court below, have obscured the issues by entering into extended analysis of whether foreign or domestic law would control the definition of a spouse under

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[16] Petitioners rely extensively on *Miles* v. *United States*, 103 U. S. 304, but the holding of that case that "a witness who is *prima facie* incompetent" (p. 314) cannot testify to her own competence is not applicable in a case such as this in which the *prima facie* case, and indeed all of the evidence except Munio Knoll's self-serving assertion, shows a mere sham marriage. In *Bassett* v. *United States*, 137 U. S. 496, also cited by petitioners (Pet. 14), there was no question as to the wife's status; the woman whose testimony was admitted against the husband in a polygamy prosecution was the first and lawful wife. The only question was whether polygamy was such an offense against the wife as would bring into effect the exception permitting a wife's testimony where the crime is against her. The decision was only to the effect that the exception was not applicable in polygamy (p. 506).

It may be noted that at the time of the trial judge's decision to admit Osborne's testimony the evidence conclusively showed that her marriage was a sham. And this posture of the evidence was characteristic, of course, of all that followed. Osborne's own testimony disclosed complete absence of any marital relationship with Knoll (*supra*, pp. 11-13), and even the self-serving statements of the conspirators disclosed further facts in support of the earlier evidence of Osborne's true status, e.g., Lutwak's recollection that it was Munio Knoll who had called for the meeting at which Osborne was paid $1,000 (*supra*, p. 15).

the immigration law, and whether the person claiming the existence of a marriage or the person denying it should prove the state of the controlling law (Pet. 18-23; R. 396, 414). These questions are not reached. The evidence disclosed, and the jury necessarily found, that petitioners conspired to do acts that would not create a marriage but only an outward appearance of a marriage, in fraud of the immigration laws. Even if it be assumed that the parties would have been bound by the marriages under French law despite the fact that they did not so intend, there would at most have been a slip-up in the outcome contemplated by the conspirators. As a matter of fact, there was no such slip-up, since the false marriages were obliterated by the subsequent divorce proceedings. In any event, conspiracy is not negated by the failure to achieve all of its objectives, once overt acts have been taken to set it in course. The jury found petitioners guilty of conspiring in a course of conduct which was not to create a marriage, but merely to create a deceitful paper facade for the purpose of illegal entry into the United States. It is not incumbent on the Government to prove that the parties would not have been bound by the marriages had some of them later refused to carry out the conspiracy by declining to acquiesce in the divorces.

CONCLUSION

The decision below is correct and no real conflict of decisions is involved. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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